Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF PUBLIC KNOWLEDGE, OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA, COMMON CAUSE, ENGINE, AND BENTON FOUNDATION

Phillip Berenbroick
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020

Michael Calabrese
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA
740 15th Street, NW, Suite 900
Washington, DC 20005
(202) 986-2700

Todd O'Boyle
COMMON CAUSE
805 15th Street, NW, Suite 800
Washington, DC 20005
(202) 883-1200

Evan Engstrom
ENGINE
414 Brannan Street
San Francisco, CA 94107
(415) 570-4455

Amina N. Fazlullah
BENTON FOUNDATION
1825 K Street, NW, Suite 400
Washington, DC 20006
(847) 328-3049

August 9, 2016

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247
	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF
PUBLIC KNOWLEDGE, OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA, COMMON CAUSE, ENGINE AND
BENTON FOUNDATION

Public Knowledge, Open Technology Institute at New America, Common Cause, Engine and Benton Foundation[1] submit these reply comments on the Commission's May 2, 2016 *Further Notice of Proposed Rulemaking* ("*FNPRM*") regarding business data services ("BDS") in the above-referenced dockets.[2]

---

[1] The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors or advisors.

[2] *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 4723 (2016) ("*FNPRM*" or "*Tariff Investigation Order*").

I. INTRODUCTION AND SUMMARY

The comments filed in response to the *FNPRM* confirm that the Commission must fix the broken BDS market now. Not surprisingly, a handful of incumbent LECs deny this reality and seek to continue price-gouging retail BDS customers—including America's businesses, schools, hospitals, and government agencies—as well as their competitors in the downstream business and mobile wireless markets. The Commission should reject the incumbents' claims and adopt reform that will result in meaningful price reductions for their TDM-based and packet-based BDS. Unless price reductions actually flow through to both retail and wholesale purchasers of these services in the form of lower payments for both TDM-based and Ethernet services, consumers will continue to bear the burden of lack of effective competition in the BDS market.

We emphasize the following facts in these reply comments:

- Incumbent LECs' recent actions—including unilaterally raising prices and denying competitors the critical benefit of circuit portability—confirm that they have abused their market power in the provision of BDS. *See* Part II.A.

- In adopting reform, the Commission's Competitive Market Test should take into account actual competition, not the specter of potential competition. The Commission should deem only those census blocks where at least four providers have actually deployed connections to customer locations as "competitive." In addition, the Commission should adopt its proposal to reapply the Competitive Market Test at least every three years to account for changes in market conditions. *See* Part II.B.

- All BDS providers, including cable companies, are common carriers subject to the baseline requirements in Sections 201 and 202 of the Communications Act. As cable companies increase their share of the Ethernet BDS market, allowing them (but not other BDS providers) to escape the "bedrock consumer protection" obligations of the Act would undermine the Commission's BDS regime. *See* Part II.C.

- Small and medium-sized businesses and the smaller locations of businesses, non-profits, and government entities will face fewer choices and higher prices for BDS if competitive LECs do not continue to have unbundled access to DS1 and DS3 capacity loops after the IP transition. *See* Part II.D.

- Claims that BDS reform will diminish broadband investment are baseless. Far from diminishing investment, BDS reform promises a virtuous cycle of increased demand, investment, and innovation. *See* Part II.E.

II. DISCUSSION

A. Incumbent LECs' Recent Actions Confirm That They Possess Market Power in the Provision of BDS.

The BDS marketplace is overwhelmingly concentrated and warrants regulatory oversight.[3] Incumbent LECs have the only facilities-based connection to approximately three-quarters of all locations with BDS demand.[4] But most incumbent LECs continue to deny this reality. For example, AT&T asserts that "the marketplace for BDS is robustly competitive at all levels."[5] Several other incumbents similarly insist that "monopolies are rare in the BDS marketplace."[6] These claims are belied not only by the record, but also by incumbent LECs' recent actions. On July 1, 2016, for example, Verizon proposed an increase in its DS1 rates in the vast majority of areas in eight states and the District of Columbia.[7] As purchasers of these BDS explain, this price increase is "a demonstration of [Verizon's] unilateral market power at a time when ILECs are arguing that 'robust' competition disciplines business data services nearly

---

[3] *See, e.g.*, Windstream Comments at 9-14; INCOMPAS Comments at 3. Unless otherwise noted, all references to "Comments" are to those filed in WC Docket Nos. 05-25 & 16-143 on June 28, 2016.

[4] *See FNPRM* ¶¶ 178-85 (discussing economists' findings).

[5] AT&T Comments at 10.

[6] CenturyLink *et al.* Comments at iv.

[7] *See* Petition of Windstream Services, LLC, INCOMPAS, EarthLink, and Sprint Corporation to Reject or Suspend and Investigate Verizon Transmittal No. 1335, In the Matter of Verizon Tariff FCC Nos. 1, 11, 14, and 16, Transmittal No. 1335, at 1-2 (filed July 8, 2016).

everywhere."[8] Similarly, three days after claiming "there is no marketplace or data-based rationale for increased regulation of *any* BDS service,"[9] AT&T proposed tariff revisions that demonstrate its market power.[10] As purchasers of these BDS summarize, "[o]nly a firm with market power would have the incentive or the ability to refuse to offer circuit portability, which is a critical input on which its customers depend, and to impose shortfall and early termination penalties that exceed expectation damages" in violation of the Commission's *Tariff Investigation Order*.[11] These actions confirm that, rather than "terminat[ing] this proceeding" as the incumbents demand,[12] the Commission must act on long-overdue BDS reform.

B. The Commission's Competitive Market Test Should Deem Only Those Census Blocks With at Least Four Providers That Have Actually Deployed Connections as "Competitive" and It Should Be Reapplied Periodically to Account for Changes in Market Conditions.

The record demonstrates that the relevant geographic market for analyzing BDS competition is the individual customer's location.[13] However, if the Commission decides to use

---

[8] *Id.* at 1.

[9] AT&T Comments at 10 (emphasis in original).

[10] *See, e.g.*, Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 539, *attached to* Letter from Kristen Shore, Executive Director – Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC (filed July 1, 2016).

[11] Petition of Birch, EarthLink, INCOMPAS, Level 3, Sprint, and Windstream to Reject or Suspend and Investigate, In the Matter of Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1847, Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 539, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3428, at 2 (filed July 8, 2016).

[12] AT&T Comments at 6.

[13] *See* Windstream Comments at 29; Sprint Comments at iii ("Sprint continues to believe that actual competition at a location (building or cell site) is the best measure of a functioning BDS market.").

census blocks as the relevant geographic market for its proposed Competitive Market Test, it must count only those providers that have actually constructed connections to customer locations in the census block as "providers" for purposes of the Test.[14] The mere presence of nearby fiber is inadequate to constrain incumbent LECs' market power.[15] As commenters have explained, if the Commission holds otherwise, it risks repeating its past mistake of relying on inaccurate proxies for competition to discipline BDS prices.[16]

Moreover, the Commission should deem only those census blocks with at least four providers that have deployed connections to customer locations as "competitive."[17] Incumbent LEC claims that markets with only two providers should be deemed competitive[18] contradicts well-established principles of economics and Commission precedent.[19] Even Verizon implicitly recognizes this fact.[20]

---

[14] *See, e.g.*, CCA Comments at 13; Sprint Comments at iii; Birch et al. Comments at 8; Windstream Comments at 34 ("[I]t is illogical to characterize a provider as a competitor where it has fiber but does not actually provide facilities-based last-mile business data services in a census block.").

[15] *See, e.g.*, INCOMPAS Comments at 8; Birch *et al.* Comments at 8; Sprint Comments at 8-12; Windstream Comments at 31-32.

[16] *See* INCOMPAS Comments at 9 ("The Commission does not want to repeat, and the economy cannot afford, a similar error in predictive judgment.").

[17] *See* Birch *et al.* Comments at 7; Sprint Comments at iii.

[18] *See* AT&T Comments at 50; CenturyLink *et al.* Comments at vi.

[19] *See* Public Knowledge *et al.* Comments at 11.

[20] *See* Verizon Comments at 3 (requiring "four or more facilities-based providers" in its proposal).

Finally, the Commission should future-proof its market analysis by adopting its proposal to reapply the Competitive Market Test at least every three years based on updated data.[21] Reapplying the Competitive Market Test at a regular interval will ensure that the Commission's reforms apply to markets where competition backslides, as well as provide a mechanism to minimize regulations in markets that become competitive. If, however, the Commission decides not to reapply the Competitive Market Test at a regular interval, it should create a streamlined process to provide purchasers of BDS an opportunity to demonstrate that BDS providers are charging supracompetitive prices in a market deemed "competitive."[22]

C. All BDS Providers Should Be Treated As Common Carriers Subject to the Bedrock Consumer Protection Provisions of Sections 201 and 202 of the Act.

We agree with INCOMPAS and Verizon that the Commission should reaffirm that all BDS providers are subject to Title II of the Communications Act, including Sections 201 and 202, regardless of the entity supplying the service.[23] As the Commission explains in the *FNPRM*, both incumbent and competitive providers of BDS—including cable companies—offer these services "directly to the public," thereby meeting the statutory definition of "telecommunications service."[24] Indeed, the cable industry has already conceded in this

---

[21] *See FNPRM* ¶ 298.

[22] *See id.* ¶¶ 301, 303.

[23] Letter from Chip Pickering, INCOMPAS, and Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Apr. 7, 2016); *see also FNPRM* ¶ 516 ("The Commission . . . has never articulated why Verizon should not have to meet, among other statutory and regulatory obligations, the reasonableness and nondiscrimination requirements in sections 201 and 202(a) of the Act that apply to other similarly situated carriers.").

[24] *See FNPRM* ¶ 257 n.672 (citing 47 U.S.C. § 153(53), defining "telecommunications service" as "the offering of telecommunications for a fee directly the public, or to such classes of users as to be effectively available directly to the public"). There is no dispute that BDS qualifies as

proceeding that "[s]pecial access services . . . are telecommunications services,"[25] and thus common carrier services.[26]

In response to the *FNPRM*, cable companies assert that the BDS they provide is "not a common-carrier service and therefore does not fall within the scope of Title II."[27] The cable companies' argument is premised on their claim they offer BDS pursuant to individually negotiated contracts.[28] Merely requiring would-be customers to call the company for specific information on terms and conditions of the proposed service does not render cable companies' BDS non-common carrier services.[29] Nor does some measure of customization of the proposed service offering transform a common carrier offering into a non-common-carrier offering. In the *Open Internet Order*, for example, the Commission held that "[s]ome individualization in pricing

---

"telecommunications," *see* 47 U.S.C. § 153(50), or that BDS is offered for a fee.

[25] Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, Attachment, at 2 (filed Jan. 8, 2014); *see also* Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed Sept. 10, 2012) (describing, in response to the Commission's forthcoming special access data collection, the information Comcast maintains "concerning the non-switched telecommunications services that it provides").

[26] *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services.").

[27] *See* Charter Comments at 19; *see also* Comcast Comments at 61; NCTA Comments at 11-15.

[28] *See* Charter Comments at 17-20; Comcast Comments at 61-71; NCTA Comments at 11-15.

[29] As noted in these reply comments, several cable companies' websites openly solicit potential purchasers of BDS to "call for details" on available offerings. These solicitations from the cable companies are open to the entire public, and therefore cable companies are offering telecommunications services to the public. By comparison, a private service would not be openly advertised to the public. Instead, the availability of private service would likely reside behind a company firewall or be available internally only.

or terms is not a barrier to finding that a service is a telecommunications service"[30] and "[t]o the extent our prior precedent might suggest otherwise, we disavow such an interpretation in this context."[31] Indeed, in rejecting arguments that Internet traffic exchange arrangements made to provide broadband Internet access service constitute private carriage arrangements because they contain more individualized terms and conditions, the Commission pointed out that "this circumstance is not inherently different from similarly individualized commercial agreements for certain enterprise broadband services"—in other words, BDS—"which the Commission has long held to be common carriage telecommunications services subject to Title II" of the Act.[32] The Commission explained that the fact that "the individualized terms may be negotiated does not change the underlying fact that a broadband provider holds the *service* out directly to the public."[33]

Moreover, to the extent that cable companies suggest in their comments that the Commission cannot find a service to be a telecommunications service without applying the common law test of common carriage under the D.C. Circuit's *NARUC I* decision,[34] the D.C. Circuit recently rejected that argument. In its recent opinion affirming the *Open Internet Order*,

---

[30] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 363 (2015) ("*Open Internet Order*").

[31] *Id.* ¶ 363 n.1012.

[32] *Id.* ¶ 364.

[33] *Id.* (emphasis in original).

[34] *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"). Under the *NARUC I* test, "a carrier has to be regulated as a common carrier if it will make capacity available to the public indifferently or if the public interest requires common carrier operation." *United States Telecom Ass'n v. FCC*, 2016 WL 3251234, at * 18 (June 14, 2016) (internal citation omitted).

the court held that because the Commission found that broadband Internet access services satisfy the statutory definition of telecommunications services, the agency was not required to apply the *NARUC I* test.[35] As in the case of broadband Internet access services, cable companies offer BDS "directly to the public or to such classes of users as to be effectively available directly to the public" and thus meet the statutory definition of telecommunications services.[36] For example, while Comcast argues that its cell backhaul BDS service is not a telecommunications service,[37] it holds that service out directly to all mobile wireless carriers via its website.[38] Similarly, Charter offers its optical Ethernet BDS directly to the public, including multi-location businesses, schools, libraries, and health care providers, via its website.[39] And, as in the case of broadband Internet access services,[40] the fact that a potential customer must provide its service location information does not alter these conclusions.[41]

---

[35] *United States Telecom Ass'n v. FCC*, 2016 WL 3251234, at * 18 (June 14, 2016); *see also id.* ("US Telecom cites no case, nor are we aware of one, holding that when the Commission invokes the statutory test for common carriage, it must also apply the *NARUC* test.").

[36] *See* 47 U.S.C. § 153(53).

[37] Comcast Comments at 63.

[38] *See* Comcast Business, Cell Backhaul, https://business.comcast.com/ethernet/cell-backhaul (last visited Aug. 4, 2016).

[39] *See* Charter Communications, Spectrum Business Ethernet, https://business.spectrum.com/content/business-ethernet (last visited Aug. 4, 2016).

[40] *See Open Internet Order* ¶ 363.

[41] *See, e.g.*, Comcast Business, Cell Backhaul, https://business.comcast.com/ethernet/cell-backhaul (last visited Aug. 4, 2016) ("While we offer service in most areas, please use this tool to make sure there's availability near you.").

Additionally, while broadband Internet access service is somewhat more standardized than BDS, BDS offerings are not as highly customized as the cable industry suggests.[42] For example, as the Commission recognizes in the *FNPRM*, based on standards established by the Metro Ethernet Forum, common Ethernet service offerings include Ethernet Private Line Service, Ethernet Virtual Private Line Service, Ethernet LAN Service, and Ethernet Dedicated Internet Access Service.[43] Incumbent LECs, competitive LECs, and cable companies alike offer these BDS products.[44]

Even if the Commission were to defy precedent and find that cable companies do not offer BDS directly to the public, and therefore do not offer BDS on a common carrier basis, the public interest requires cable BDS providers (like all other BDS providers) to be treated as common carriers. Under the *NARUC I* test, "a carrier has to be regulated as a common carrier if it will make capacity available to the public indifferently or if the public interest requires common carrier operation."[45] Here, the public interest requires cable companies to provide BDS on a common carrier basis. In particular, given that BDS are "critical" inputs in today's economy,[46] purchasers of BDS—including schools, libraries, health care providers, and

---

[42] *See* NCTA Comments at 12.

[43] *FNPRM* ¶ 47.

[44] *See, e.g.*, Verizon, Ethernet, Networking Products, http://www.verizonenterprise.com/products/networking/ethernet/ (last visited Aug. 4, 2016); Level 3, Level 3 Ethernet Services, http://www.level3.com/en/products/ethernet/ (last visited Aug. 4, 2016); Charter Communications, Spectrum Business Ethernet, https://business.spectrum.com/content/business-ethernet (last visited Aug. 4, 2016).

[45] *See supra* note 34.

[46] *FNPRM* ¶ 44.

government entities—should have access to these services upon reasonable request and on just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions.[47] In addition, purchasers such as schools, libraries, and community anchor institutions—which may have relatively little experience in dealing with large service providers—may not be able to protect themselves against a BDS provider's unreasonable conduct. Even large, sophisticated buyers often lack the leverage to obtain BDS on just and reasonable rates, terms, and conditions because they generally have—at most—one alternative to their current BDS supplier.

Notably, as Verizon points out, treating cable companies and all other BDS providers as common carriers would not require them to provide service to every prospective customer.[48] Section 201(a) requires carriers to furnish service "upon *reasonable* request,"[49] and Section 202(a) prohibits only "*unjust* or *unreasonable* discrimination"[50] in the provision of service. And, as the D.C. Circuit has held, "business may be turned away [by a common carrier] either because it is not of the type normally accepted or because the carrier's capacity has been exhausted."[51] Common carriage, in other words, requires only that cable companies provide service in response to *reasonable* requests and on terms that do not *unreasonably* discriminate. Thus, the notion that common carrier treatment would somehow mean that a cable company operating only in Washington, DC would have an obligation to provide BDS in Baltimore, MD is specious.

---

[47] 47 U.S.C. §§ 201(a), 201(b), 202(a).

[48] Verizon Comments at 19.

[49] 47 U.S.C. § 201(a) (emphasis added).

[50] *Id.* § 202(a) (emphases added).

[51] *NARUC I*, 525 F.2d at 641.

To be sure, the Commission does not have "unfettered" discretion to impose common carrier status on a given entity.[52] However, even in *NARUC I*, the D.C. Circuit noted that "it is clear that the Commission had the discretion to require" the SMRS operators at issue to offer their services on a common carrier basis.[53] Moreover, while the cable companies argue that the Commission cannot impose common carrier requirements on cable BDS providers without a finding of "monopoly-level market power,"[54] the Commission's precedent suggests that the agency's discretion is not so constrained. As the Commission has stated, although its "public interest analysis [under the *NARUC I* test] has generally focused on the availability of alternative facilities, we are not limited to that reasoning."[55] In applying the test, the agency has considered not only the availability of alternative services, but also whether the public interest benefits outweigh the cost of applying regulation.[56]

Here, the record evidence demonstrates that nearly all locations with BDS demand are served by no more than two facilities-based providers[57] and the Commission has already held

---

[52] *Id.* at 644.

[53] *Id.* at 644 n.76.

[54] *See* Comcast Comments at 69; *see also* NCTA Comments at 14, n.35.

[55] *AT&T Corp. et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, Cable Landing License, 14 FCC Rcd 13066, ¶ 39 (1999); *see also id.* ¶ 40 ("We note, however, that we always have the ability to impose common carrier or common-carrier-like obligations on the operations of this or any other submarine cable system if the public interest so requires. Furthermore, we have always maintained the authority to classify facilities as common carrier facilities subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently.").

[56] *Id.* ¶ 39.

[57] *FNPRM* ¶ 181. This is in contrast to the precedent cited by the cable companies. For example in *NorLight*, "[n]umerous interexchange carriers . . . already provide[d] service in NorLight's

that duopoly markets lead to supra-competitive pricing and inflict other harms on consumers.[58] Ensuring that all BDS providers are subject to the requirements of Sections 201 and 202 of the Act therefore promotes the public interest. As other commenters have explained, "[a]lthough these baseline requirements are not burdensome, they provide important safeguards against harmful practices."[59] In fact, the Commission has held that Sections 201 and 202 "lie at the heart of consumer protection under the Act"[60] and has long applied them even to providers that lack market power.[61]

Furthermore, as Verizon explains, allowing cable BDS providers to avoid these duties while requiring incumbent LECs and non-cable competitive LECs to comply with them could "create an uneven playing field."[62] Indeed, the Commission has previously held with regard to BDS that "disparate treatment of carriers providing the same or similar services is not in the

---

proposed area of operation." *NorLight Request for Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd 132, ¶ 19 (1987). In *NorLight*, moreover, the service provider was not "in a position to hold itself out indiscriminately to the public" because its "primary objective [wa]s to meet the internal needs of [its] parent utilities." *Id.* ¶¶ 21, 23. *NorLight* is therefore easily distinguished from the instant proceeding.

[58] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶¶ 30-31 (2010).

[59] Birch, EarthLink, and Level 3 Comments at 38.

[60] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 15 (1988); *see also id.* (explaining that Sections 201 and 202 codify "bedrock consumer protection obligations").

[61] *Id.* ¶ 17.

[62] Verizon Comments at 18.

public interest as it creates distortions in the marketplace that may harm consumers."[63] For these reasons, the Commission should treat all BDS providers as common carriers. And, if the FCC finds that multiple providers in a census block it deems to be non-competitive have market power, then the Commission should apply its new regulatory framework to all such providers, regardless of whether those providers are incumbent LECs, cable companies, or competitive LECs.

Finally, if the Commission nonetheless finds that cable BDS providers should not be treated as common carriers, the Commission must ensure that cable BDS remain subject to universal service contributions.[64] Otherwise, lack of contributions based on revenues generated from these lucrative services could jeopardize the Universal Service Fund and undermine the Commission's ability to satisfy its universal service goals.

D. The Commission Should Ensure That Competitive LECs Have Continued Access to Unbundled DS1 and DS3 Loops Used to Serve Lower Bandwidth Customers.

We agree with Windstream that Section 251 of the Act is technology neutral and therefore the unbundling provisions of Section 251(c)(3) apply to loops that are comprised of fiber or transmit traffic in an IP format.[65] There is no reason for competitive LECs to lose unbundled access to DS1 and DS3 capacity loops after the IP transition. As Windstream

---

[63] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. Sec. 160(c) from Title II and Computer Inquiry Rules*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶¶ 67-68 (2007).

[64] *See, e.g., Universal Service Contribution Methodology et al.*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 9 (2012) (explaining that in 1997, the Commission exercised its permissive authority under Section 254(d) of the Act to require private carriers to contribute to the Fund) (internal citation omitted).

[65] *See* Windstream Comments at 63-67.

explains, the use of fiber or IP transmission does not magically eliminate the extremely high economic and operational barriers to competitive loop deployment, particularly for loops used to provide lower bandwidth services.[66] Without continued access to this unbundled capacity, competitive LECs may be unable to serve small and medium-sized businesses as well as the smaller sites of enterprises, nonprofits, and government entities.[67] As a result, these retail customers could face decreased choices and increased rates for BDS.

E. BDS Reform Will Spur Investment and Innovation in the Telecommunications Industry.

The Commission should reject incumbent LEC arguments that BDS reform will decrease network investment. CenturyLink in particular asserts that the *FNPRM* poses an "immense threat" to its "continued ability to invest in next-generation networks and services, particularly in rural communities."[68] But CenturyLink provides no concrete evidence to support this claim. CenturyLink's unquantified and unsupported claim that regulation will decrease investment – a claim CenturyLink raises in response to most regulations proposed by this Commission[69] – does not make it so.

To the extent CenturyLink offers any explanation for its assertions on the effects of pro-

---

[66] *Id.* at 66.

[67] *Id.* at 63, 66.

[68] CenturyLink Comments at iv.

[69] *See, e.g.*, Comments of CenturyLink, CS Docket No. 97-80, at 2 (filed Apr. 22, 2016) (arguing that the Commission's set-top box "rules, as proposed, would impede CenturyLink's ability and limit its incentive to innovate and invest in new navigation technologies"); Reply Comments of CenturyLink, GN Docket No. 14-28, at 8 (filed Sept. 15, 2014) (asserting that "the new [Open Internet] rules proposed in the NPRM" "would deter investment and thereby actually deter deployment").

consumer BDS regulation on investment, CenturyLink's argument appears to be based on the premise that the Commission will require incumbents to charge below-cost rates[70] rather than decrease excessive, above-cost rates. CenturyLink has told investors that it is not concerned about its "net exposure . . . between special access revenue versus [its] costs."[71] The Commission has stated, however, that one of the "essential" tenets of "any effort to ensure reasonable rates in non-competitive markets" is that "the service provider have an opportunity to recover its costs of service."[72] Additionally, there is evidence in the record that, due to the high price elasticity of demand for BDS, "there is likely to be little if any adverse revenue impact from reasonable declines in price,"[73] and that increased demand may actually lead to increases in

---

[70] *See* CenturyLink Comments at 7 ("The Commission must likewise ensure that any rate reductions are commensurate with the economist costs associated with delivering service . . . .").

[71] *See* CenturyLink, Inc., FQ1 2016 Earnings Call Transcript, at 11 (May 4, 2016), *available at* http://ir.centurylink.com/file.aspx?iid=4057179&fid=1500085040 (explaining that special access revenue is "high margin" and "there aren't a lot of continuing incremental expenses associated with providing that service").

[72] *FNPRM* ¶ 364.

[73] *See* J. Scott Marcus, WIK-Consult, "Welfare Effects of Reductions in Price of Leased Line Equivalents in the U.S.," at 8 (July 26, 2016) ("WIK-Consult Report"), attached to Letter from Karen Reidy, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 & 05-25 (filed July 28, 2016). Cable-financed criticisms of the WIK-Consult Report specifically, and the Commission's overall economic analysis more broadly, are unfounded. *See, e.g.*, George S. Ford, PhD, *Learning from Bad Technique: The* WIK-Consult Report *on Business Data Services* 1 (Aug. 4, 2016), http://www.phoenix-center.org/perspectives/Perspective16-07Final.pdf ("Phoenix Center Report"). The data collection underlying the Commission's proposed reforms "likely represents the most comprehensive collection of information ever assembled for a Commission rulemaking proceeding." *FNPRM* ¶ 43. The Phoenix Center submission does nothing to refute this finding. The paper claims that no party in the proceeding has provided the Commission with convincing evidence that BDS prices are not just and reasonable, but the sole source of support for its claim is another Phoenix Center study from half a decade ago in 2011. *See* Phoenix Center Report at 1, n.3.

gross revenues for BDS providers.[74] CenturyLink's fears are therefore unfounded.

The reality is that incumbent LEC overpricing of, and anticompetitive terms and conditions for, BDS have stifled investment and innovation and been an enormous drag on the nation's economy.[75] And BDS reform will increase—not deter—broadband investment. As INCOMPAS explains, "[c]ompetitive reform—that includes meaningful price reduction—in the [BDS] market will promote a 'virtuous cycle' of investment and development, because . . . competition spurs innovations by network providers, which drive end-user demand for more advanced broadband services, which in turn stimulates competition among providers to further invest in their broadband networks and the services offered over those networks."[76]

For example, rules to constrain incumbents' market power in the provision of BDS would enable competitive carriers to "develop innovative higher-layer services that meet the diverse

---

[74] *See* WIK-Consult Report at 8 ("There is a natural tendency to assume that a reduction in price translates into a reduction in revenue for the provider of the service; however, this is not necessarily the case. Depending on the level of the [price elasticity of demand], a reduction in price is likely to have very little impact on revenues; in fact, if the PED is high enough, *a reduction in price can lead to an increase in revenues* for providers of the service.") (emphasis in original); *id.* at 26 ("The price elasticity of demand for business data services is substantial; consequently, any price reductions would tend to be offset by increased volumes. The price elasticity of demand (PED) for these services is somewhere between -1.0 and -2.0, with the balance of evidence suggesting that it is significantly in excess of -1.0. At a relatively unlikely PED of -1.0, reductions in price of up to 25% reduce revenues by at most slightly over 6%; under much more realistic assumptions, these reductions in price actually increase gross revenue.").

[75] *See, e.g.*, *id.* at 10; Windstream Comments at 3 ("A February 2016 study by WIK-Consult . . . found that the cost of leaving supracompetitive rates in place is extraordinary. Over five years, a failure to establish just and reasonable Ethernet rates results in: [a] loss of $11 billion for business consumers, and [a] loss of $30 billion for the economy as a whole. The Consumer Federation of America estimates the losses to American consumers are even higher—at $150 billion since 2010.") (internal citations omitted).

[76] Letter from Karen Reidy, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 & 05-25, at 1 (filed July 28, 2016).

needs of business customers around the country," thereby spurring "an increase in demand for last-mile capacity" and providing both incumbent and competitive BDS providers "with greater incentives to deploy fiber to business customer locations."[77] Similarly, as numerous commenters discuss, exploding consumer demand for mobile broadband services and the advent of 5G will significantly increase demand for backhaul.[78] And mobile wireless carriers' growing need for this critical input will, in turn, spur investment by BDS providers, enable mobile wireless carriers to deliver innovative services and boost consumer demand for those services.

III. CONCLUSION

The Commission should adopt BDS reform consistent with the foregoing reply comments and the June 28, 2016 comments filed in this proceeding by Public Knowledge, Open Technology Institute at New America, Common Cause, Engine and others.

---

[77] Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25, at 69 (filed Jan. 27, 2016).

[78] *See, e.g.*, CCA Comments at 4-5; CCIA Comments at 3-5; Letter from CCA, INCOMPAS, Sprint, T-Mobile, and U.S. Cellular, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1-2 (filed Apr. 21, 2016).

Respectfully submitted,

/s/ Phillip Berenbroick
Phillip Berenbroick
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020

/s/ Michael Calabrese
Michael Calabrese
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA
740 15th Street, NW, Suite 900
Washington, DC 20005
(202) 986-2700

/s/ Todd O'Boyle
Todd O'Boyle
COMMON CAUSE
805 15th Street, NW, Suite 800
Washington, DC 20005
(202) 883-1200

/s/ Evan Engstrom
Evan Engstrom
ENGINE
414 Brannan Street
San Francisco, CA 94107
(415) 570-4455

/s/ Amina N. Fazlullah
Amina N. Fazlullah
BENTON FOUNDATION
1825 K Street, NW, Suite 400
Washington, DC 20006
(847) 328-3049

August 9, 2016